

6 Official Opinions of the Compliance board 63 (2008)

**“MEETING” – TO EXTENT RETREAT LIMITED TO
DISCUSSION OF INTERPERSONAL RELATIONS AND
SOCIAL CONVERSATION, HELD NOT TO BE A MEETING**

October 24, 2008

Mr. Joseph Jordan

The Open Meetings Compliance Board has considered your complaint that the governing body of Rockville violated the Open Meetings Act during a retreat conducted at a restaurant on June 2, 2008. For the reasons set forth below, we find that, to the extent the 6:00 p.m. session on June 2, 2008, was limited to discussion of interpersonal relations and social conversation among participants, the session was not subject to the Open Meetings Act. However, we are troubled by the suggestion that conversation may have extended to a proposed change in Council procedures. Had it done so, that aspect of the session would have violated the Act. However, based on the record before us, it is a question we cannot resolve.

I

Complaint and Response; Supplemental Record

According to your complaint, the Mayor, two members of the Council, and the City Manager met at a restaurant on June 2, 2008, for purposes of conducting a retreat. Two other members of the Council declined to participate. Statements by participants have led you to believe that City business or policy was discussed on this occasion in violation of the Open Meetings Act. You referred to an e-mail communication by Councilwoman Marcussio in advance of the retreat indicating she wanted to discuss “our interests,” a reported statement by Mayor Hoffman indicating that the goal of the retreat would be “how best to work together to implement policy,” and statements by the Mayor and by Councilman Britton during a public session the same date in which they each alluded to a policy discussion during the retreat.

In a timely response on behalf of the City’s governing body, Sandra Haran Block, Assistant City Attorney, argued that the retreat was not a meeting subject to the Open Meetings Act. The response addressed differing views among Council members as to the merit of the Mayor and Council holding a retreat in an informal setting, along with the City Manager, the only staff member present. Councilman Gajewski opposed the idea, concerned that discussion could inadvertently slip into

areas that would violate the Open Meetings Act; Councilwoman Robbins opposed a retreat absent a facilitator and agenda. During a May 19, 2008 meeting, it was decided to hold a retreat at the cottage on the grounds of the City's Civic Center Mansion on June 2, divided into two sessions. A public agenda revealed that at 6:00 p.m., there would be a "Mayor and Council Retreat" for a "[d]iscussion of the betterment of interpersonal relations among the Mayor and Council." This session would be closed to the press and public. At 8:00 p.m., there would be a "[r]eview of Mayor and Council Priorities," which would be an open session. On May 30, the City Attorney's office provided Council members a memorandum addressing the limits of discussion during the initial portion of the retreat to avoid running afoul of the Open Meetings Act. And in responding to the complaint, the Assistant City Attorney interviewed each participant present during the 6:00 p.m. session as well as the two council members who declined to participate.

When the participants met at the cottage at 6:00 p.m. and it was apparent that Councilman Gajewski and Councilwoman Robins were not going to attend, a decision was made to move to a local restaurant, "Taste of Saigon." Participants traveled together in the City Manager's car, and were seated in an open dining area.

The retreat started with purely social conversation, but at some point, the Mayor opened discussion about interpersonal issues. The consensus suggested criticisms were "made in a jovial and good-natured manner" and there was some lamenting that other Council members were not present, making discussion more difficult. This discussion lasted a short time and conversation then turned to "typical dinner-chatter."

Participants' memories of topics discussed varied. Topics recalled by some, but not all, included the development of Town Square, fire department activity, family matters, and how they would travel to the Maryland Municipal League Convention. The complaint referenced Councilwoman Marcuccio's e-mail about her desire to discuss "our issues" and questioned whether she meant personal interests; however, according to the City's response, that is exactly what she intended. When questioned whether policy or City business was discussed, each participant denied such discussion occurred, with several participants noting that they were supersensitive about avoiding such matters. At approximately 7:40 p.m., the participants returned to the cottage, arriving just before the 8:00 p.m. public session of the retreat. The latter session was open to the public.

The response argued that the constructive criticism that transpired during the initial session was not subject to the Open Meetings Act in that it pertained to the betterment of interpersonal relations. The remainder of the dinner was essentially a social gathering. The response also noted a prior opinion of the Open Meetings Compliance Board, recognizing that public officials make "stray comments relating to public business" and such "passing references" do not violate the Act. The

Assistant City Attorney was unable to determine what statements allegedly made by the Mayor and Councilman Britton during the public session raised Mr. Jordan's suspicions. She noted, however, that the complainant was not present at the session.

Following our receipt of the governing body's response, Councilman Gajewski submitted a "dissent response." Councilman Gajewski noted that, rather than a social setting, the 6:00 p.m. session was advertised as a meeting of the Mayor and Council and was described as "closed to the public." In his view, "if *any* public business was discussed ... [i]t should indeed trigger a violation of the ... Open Meetings Act." In support of his allegation that public business was considered during the 6:00 p.m. session, Councilman Gajewski noted that: (1) if the sole purpose was interpersonal relations among the Mayor and Council, requiring the City Manager's attendance was nonsensical; if relations with the City Manager were at issue, discussion involved a performance evaluation; (2) Councilwoman Marcuccio's May 19, 2008 e-mail, referenced in the original complaint; (3) Mayor Hoffman's comment about "how best to work together to implement policy"; conversation about strategies crosses the line into new policy and constitutes public business; (4) as to the acknowledged discussion about Town Square, Town Square issues frequently come before the Mayor and Council and the related satisfaction is clearly a public business discussion; (5) a statement by Councilman Britton during the subsequent open session that those attending had a "great conversation about process and relationships"; he was unable to explain his reference to "process"; and (6) in response to Councilman Gajewski's proposal to lay over any item of new business one week, the Mayor's mention that Councilwoman Marcuccio mentioned the concept at dinner. In Mr. Gajewski's view, "a finding that *any one* of [those] items ... contributed a discussion of public business should lead to the conclusion that the ... Act was violated." (emphasis in original)

On receipt of Councilman Gajewski's letter, we forwarded it to the City Attorney's Office to offer the majority of the governing body an opportunity to respond. Ms. Block disputed Councilman Gajewski's suggestion that the facts present an "inescapable conclusion" that public business was discussed. The City Manager was present at the request of a majority of the governing body because he had to deal with the relationships among the governing body. There was no evidence his performance was discussed. Ms. Block re-emphasized that, absent the full governing body, the discussion of interpersonal relations was relatively short, and the discussion then turned to social conversation. While the City governing body acknowledged numerous actions involving Town Square, the supplemental response noted that the "casual comments ... about how happy they are that Town Square seems to be doing well does not constitute conducting public business." The supplemental response did not address the reference to statements by Councilman Britton and Mayor Hoffman captured on tape during the public session, but simply

noted that Councilman Gajewski did not share the tape with the City.¹ The supplemental response stated that the participants stand by the original response.

II

Analysis

Our role is limited to evaluating whether or not the session was a meeting governed by the Open Meetings Act, regardless of whether the 6:00 p.m. retreat on June 2 was announced as a meeting of the Mayor and Council. If the session was a meeting subject to the Act, it violated the Act for, among other reasons, it was not conducted at the announced location. And although it was conducted in a public restaurant, it certainly was not conducted in a manner in which the public could reasonably observe. In fact, it was never intended that the session would be public. On the other hand, if the Open Meetings Act did not apply, no violation could have occurred. Any notice of the session to the public would have simply been gratuitous.

Deciding whether the Open Meetings Act applies to a gathering involves a three-part analysis: (1) Is the entity in question a public body subject to the Act? (2) If so, did the particular gathering constitute a meeting, that is, did it involve a quorum gathered “for the consideration or transaction of public business?” (3) Finally, if the first two factors are satisfied, was the topic of discussion subject to the Act? §§10-502(g) and (h) and 10-503; 5 *OMCB Opinions* 194, 196 (2007).

There is no doubt that the governing body of Rockville is a public body. *Cf.* 3 *OMCB Opinions* 26, 27-28 (2000). And a quorum was present at the 6:00 p.m. session.² The question is whether this portion of the retreat involved the “consideration or transaction of public business.” The label, such as “retreat,” attached to a particular session is not determinative. In a prior opinion, we have recognized that if the sole purpose of a meeting is to simply improve interpersonal relations among the membership of a public body, the Open Meetings Act does not

¹ The tape was not provided to the Compliance Board. Subsequent to the City’s supplemental response, Councilman Gajewski offered to share a copy with the Compliance Board if we requested it. We declined to do so since it would have triggered an opportunity for a further response from the City, further delaying the processing of Mr. Jordan’s complaint, and unlikely would have added any certainty to what transpired during the earlier session.

² In referring the complaint to the City, we requested that the response address, as a preliminary issue, what would constitute a quorum under Rockville’s municipal charter. Ms. Block indicated that the Mayor and four council members together serve as the City’s governing body and three members of the body are required to conduct City business. Thus, a quorum of the governing body was present during the session at issue.

apply. 3 *OMCB Opinions* 274, 275-76 (2003).³ On the other hand, if a public body were to use the occasion to establish its agenda, to discuss specific matters that come before the public body, or otherwise cover matters subject to the Act, the meeting would be subject to the Act. *See, e.g., 3 OMCB Opinions* 122, 124-25 (2001).

While one might construe differently the motives of participants leading to the 6:00 p.m. retreat, in our view, the advice from the City Attorney's Office, issued two days in advance of the session, and provided as part of the response, likely would have limited any prior agendas to ensure compliance with the Act. We also accept the respondents' acknowledgment that, under the circumstances, those attending appeared to have been supersensitive to issues under the Open Meetings Act. And once the discussion of interpersonal relations was complete, there was nothing wrong with the participants using the remainder of the time for social conversation. Furthermore, we note that every individual in attendance independently claimed that public business was not considered. We also accept the respondents' explanation that casual discussions about the status of Town Square, unrelated to pending business of the Council, would not violate the Act.

However, more troubling are certain statements apparently made during the subsequent public meeting, namely, a statement by the Mayor that the idea of tabling new business was raised during dinner, an allegation that the response did not directly address. Had that idea been explored during the 6:00 p.m. session, it would have been the start of discussions of a new policy for the governing body and subject to the Act. *Compare 1 OMCB Opinions* 113, 114-15 (1995) (developing policy for dealing with conduct during meeting subject to the Act). Notwithstanding the extensive correspondence, based on the record before us, we cannot resolve whether this issue was explored during the 6:00 p.m. session or whether the reported reference to "process" during the subsequent meeting might have referred to this matter.⁴

³ Although a facilitator is not required at a retreat, a third party familiar with the Open Meetings Act could clearly serve as an appropriate check in ensuring conversation did not drift to areas in which the Act would apply.

⁴ In considering this issue, it is worth repeating the limits of our authority. We are not an investigatory body or an adjudicatory body with compulsory process or other tools for conducting factual inquiries. *See, e.g., 1 OMCB Opinions* 101, 102 (1994) and 3 *OMCB Opinions* 136, 137-38 (2001). Recognizing these limits, the General Assembly has recognized that there will be situations where we are unable to issue conclusive decision. §10-502.5(f)(2). Councilman Gajewski suggested that the burden of proof ought to rest on members of the public body. However, unlike a judicial proceeding, neither side has the burden of proof in a complaint filed with the Compliance Board. *See 1 OMCB Opinions* 178, 181 (1996).

III

Conclusion

We find that, to the extent the 6:00 p.m. session on June 2, 2008, was limited to discussion of interpersonal relations and social conversation among participants, the session was not subject to the Open Meetings Act. However, we are quite troubled by the suggestion that conversation may have extended to a proposed change in Council procedures. Had it done so, that aspect of the session would have violated the Act. However, based on the record before us, it is an issue we cannot resolve although the actions of the governing body raise serious questions in the minds of the public about exactly what was discussed at the restaurant.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire

Courtney J. McKeldin

Julio Morales, Esquire